Nos. 83-589 and 83-669

In the Supreme Court of the United States

OCTOBER TERM, 1983

HOPI INDIAN TRIBE, PETITIONER

v.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.

NAVAJO MEDICINEMEN'S ASSOCIATION, ET AL., PETITIONERS

v.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the expansion of a ski facility that has existed for more than 50 years on the San Francisco Peaks in the Coconino National Forest violates the First Amendment rights of Indians to freely exercise their religious beliefs and practices when the government has not denied or restricted the Indians' access to their sacred sites and the Indians failed to show that their essential religious practices must be conducted only in the small portion of the Peaks devoted to the ski facility.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-50)[1] is reported at 708 F.2d 735. The district court's memorandum opinions (Pet. App. 51-82 and 93-102) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1983. Petitions for rehearing, filed by the Hopi Indian Tribe and the Navajo Medicinemen's Association, were

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[1] "Pet. App." refers to the appendix to the petition in No. 83-589.

denied on July 14, 1983, and July 26, 1983, respectively (Pet. App. 148-151). The petition for a writ of certiorari in No. 83-589 was filed on October 7, 1983, and the petition for a writ of certiorari in No. 83-669 was filed on October 21, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the First Amendment to the United States Constitution and the American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469, 42 U.S.C. (Supp. V) 1996, are set forth at pages 3-6 of the petition in No. 83-589.

STATEMENT

1. Coconino National Forest belongs to the United States. It was established by Presidential Proclamation No. 818 on July 2, 1908 (35 Stat. 2196). Congress has placed the administration of that national forest in the Department of Agriculture, pursuant to the provisions of 16 U.S.C. 482n, 482n-3, 497, 528, 531, and 551.

The San Francisco Peaks is a mountain that encompasses 75,000 acres and rises to 12,633 feet, the highest point in Arizona (Pet. App. 4-5). Ski facilities have existed within a 777-acre portion of the San Francisco Peaks since the mid-1930's (*id.* at 5). During this period, the United States Forest Service built a ski lodge at what is now the Snow Bowl picnic ground, and the Civilian Conservation Corps built a road to the lodge. The present ski lodge was built in 1956. The ski facility utilized a rope tow as the primary uphill mode of transportation until 1958, when it was replaced by a Poma lift, which is still in use today. A chairlift was installed in 1962. With the exception of some new trail widening and small surface installation, the 777-acre permit area and facilities at the Snow Bowl have changed very little since 1962. *Ibid.*

The facility has been operated by various parties, and in April 1977 the special permit for the Snow Bowl operation in the national forest was transferred to Northland Recreation Co. (Pet. App. 5). In July 1977, Northland submitted to the Forest Service a master concept plan for future development within the existing permit area. The plan addressed the need for additional parking, lodge and uphill facilities, and additional slopes of varying skill levels. *Ibid.*

In late summer 1977, the Forest Service solicited alternatives to the proposed plan as part of its environmental analysis (Pet. App. 5). Ultimately, the Forest Service selected six alternatives to Northland's proposal, which were analyzed in a draft environmental impact statement. Special efforts were made to solicit comments from the Hopi and Navajo Indians, who regard the area as sacred. *Id.* at 6.

On December 31, 1980, after intermediate administrative proceedings, the Chief of the Forest Service issued a final agency decision. The alternative selected by the Forest Service provided for considerably less development than the master plan proposed by Northland (Pet. App. 133-145). The decision allowed a limited expansion of the Snow Bowl ski area within the existing permit boundaries and allowed improvement of the Arizona Snow Bowl Road under the "dual permit system."[2]

2. Three suits were filed to prevent the Forest Service from issuing permits to authorize the improvement of the recreational facilities within the Snow Bowl area. In one

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[2]Under the dual permit system, the Forest Service issues a long-term permit to build major improvements within 80 acres or less for a maximum of 30 years pursuant to 16 U.S.C. 497, together with a revocable permit to build less permanent improvements, such as ski lifts and trails, under 16 U.S.C. 551, which contains no limitation on acreage or time.

suit, the Wilsons, non-Indians who own nearby Fern Mountain Ranch, contended that the Forest Service's proposed actions violated the National Historic Preservation Act (NHPA), 16 U.S.C. 470 *et seq.*, and the regulations promulgated thereunder, 36 C.F.R. Pt. 800, and statutes regulating the management of the national forests. The Wilsons argued, first, that the Forest Service had violated the NHPA with respect to two National Register properties (one being the Wilsons' ranch) in the vicinity of the Snow Bowl;[3] and, second, that the Forest Service violated the Act when it declined to include the San Francisco Peaks themselves in the National Register. Pet. App. 79-82.

In the two other suits, the Hopi Tribe and the Navajo Medicinemen's Association, an association of persons who have received special training in religious beliefs and practices of the Navajo, alleged that the existence of — let alone the expansion of — a ski facility on the San Francisco Peaks would violate the Indians' free exercise rights under the First Amendment; the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. (Supp. V) 1996; an alleged trust responsibility between the federal government and Native Americans; and various environmental laws. In their suits, the Indian plaintiffs sought to have the existing facilities dismantled and removed. Pet. App. 52-53.

All parties filed cross-motions for summary judgment. On June 15, 1981, the district court entered summary judgment in favor of the government on all claims with the exception of that arising under the NHPA (Pet. App. 51-92). The NHPA claim was remanded to the Forest Service,

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[3]Specifically, the Wilsons argued that because the new ski lifts and slopes would be visible from their ranch, there would be an "adverse effect" under 36 C.F.R. 800.3(b), and that the increased tourist traffic would increase the dangers of trespassing, vandalism, and arson at their ranch. The Forest Service and the court of appeals analyzed and rejected these contentions. Pet. App. 38-40.

and the Forest Service was enjoined from permitting any improvement of the ski facility pending administrative remand proceedings. After completion of the administrative remand proceedings, the government filed a motion for entry of final judgment accompanied by a Notice of Compliance; the Indians filed motions under Rule 60(b), Fed. R. Civ. P., seeking relief from the June 15, 1981, judgment in which their claims had been rejected. Pet. App. 94-95.

On May 14, 1982, the district court denied the Indians' motions and granted the government's motion, finding that the agency proceedings on remand had satisfied the requirements of the NHPA (Pet. App. 93-102). Accordingly, the court vacated the injunction that had prevented the Forest Service from issuing the permits for the Snow Bowl improvements.

3. The court of appeals, in a comprehensive opinion, affirmed (Pet. App. 1-50). With respect to the religious freedom issues raised by petitioners, the court of appeals concluded that petitioners had failed to show that expansion of the ski facility would burden either their religious beliefs or practices (*id.* at 8-18); the court therefore found it unnecessary to consider whether the Forest Service's proposed action constituted a compelling governmental interest or whether the Forest Service had chosen the least restrictive means of achieving that interest (*id.* at 19).

Without in any way questioning the sincerity of petitioners' religious beliefs, the court of appeals concluded that the government had not penalized petitioners for their religious beliefs and that petitioners had failed to show "that expansion of the Snow Bowl will burden their freedom to believe" (Pet. App. 12). The court then separately considered whether the government's actions would burden petitioners in the *practice* of their religion. Eschewing any judicial inquiry into the importance, or "centrality," of particular

religious practices (*id.* at 15), but noting (*id.* at 13) that petitioners' religious practices are, in a certain sense, site-specific (some ceremonies must be performed on the Peaks and religious objects must be collected there), the court endorsed an inquiry focusing on "the importance of the geographic site in question to the practice of the [petitioners'] religion" (*id.* at 16). The court explained (*ibid.*) that:

> If the [petitioners] cannot demonstrate that the government land at issue is indispensable to some religious practice, whether or not central to their religion, they have not justified a First Amendment claim. * * * We thus hold that plaintiffs seeking to restrict government land use in the name of religious freedom must, at a minimum, demonstrate that the government's proposed land use would impair a religious practice that could not be performed at any other site.

Applying this analysis to petitioners' claim, the court of appeals concluded that, notwithstanding the indispensability of the Peaks to the practice of petitioners' religion, their claim swept too broadly (Pet. App. 17-18; emphasis added):

> The Forest Service * * * has not denied the [petitioners] access to the Peaks, but instead permits them free entry onto the Peaks and does not interfere with their ceremonies or the collection of ceremonial objects. At the same time, the evidence does *not* show the indispensability of that small portion of the Peaks encompassed by the Snow Bowl permit area. The [petitioners] have not shown that expansion of the ski area will prevent them from performing ceremonies or collecting objects that can be performed or collected in the Snow Bowl but nowhere else. The record evidence is, in fact, to the contrary. * * * It must be remembered that the Snow Bowl permit area comprises only 777 of the 75,000 acres of the Peaks, and that prior construction on the Peaks has not prevented the [petitioners] from

> practicing their religions. * * * The [petitioners] simply have not demonstrated that development will prevent them from engaging in any religious practices.

The court of appeals also rejected petitioners' claim that the government had violated the American Indian Religious Freedom Act, 42 U.S.C. (Supp. V) 1996. The court concluded, after thorough examination of the legislative history, that AIRFA requires federal agencies to evaluate their policies and procedures with Indian religious practices in mind, but that the Act does not elevate Indian religious values over all competing government policies (Pet. App. 19-22). In this case, the court of appeals agreed with the district court's finding that the Forest Service had given the necessary consideration to petitioners' religious interests before deciding to approve additional development of the Snow Bowl (*id.* at 23).

These petitions for writs of certiorari followed. In addition to the instant petitions, the Wilsons filed a petition for a writ of certiorari (No. 83-282). This Court denied the Wilsons' petition on October 31, 1983.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. No further review is warranted.

1. Petitioners' primary contention (83-589 Pet. 14-19; 83-669 Pet. 14 *et seq.*) is that the mere existence of — let alone the expansion of — a ski facility on the San Francisco Peaks amounts to an impermissible burden on traditional Native American religion within the meaning of the Free Exercise Clause of the First Amendment. But petitioners' plea for "religious accommodation" (83-669 Pet. 33) does not square with their contention that the First Amendment entitles Indians to compel the federal government to dedicate the entire 75,000-acre Peaks as a religious shrine, even

though the area is wholly within a national forest. (Petitioners' grievance is not confined to the fact that the Forest Service has permitted a ski facility on 777 acres of the Peaks. Petitioners also complain that the improvements attract tourists and recreators and enable them to reach the Peaks during the summer months. *Id.* at 22.).

In a number of prior cases, the courts have rejected claims virtually identical to those advanced by petitioners here. See *Crow* v. *Gullet*, 541 F. Supp. 785 (D.S.D. 1982), aff'd, 706 F.2d 856 (8th Cir. 1983), cert. denied, No. 83-434 (Nov. 7, 1983); *Badoni* v. *Higginson*, 638 F.2d 172 (10th Cir. 1980); *Sequoyah* v. *TVA*, 620 F.2d 1159 (6th Cir.), cert. denied, 449 U.S. 953 (1980); *Inupiat Community of the Arctic Slope* v. *United States*, 548 F. Supp. 182 (D. Alaska 1982), appeal pending on other grounds, No. 82-3678 (9th Cir.).[4] These cases have employed the two-step analysis for evaluating Free Exercise claims established by this Court. See, *e.g.*, *Thomas* v. *Review Board*, 450 U.S. 707 (1981); *Sherbert* v. *Verner*, 374 U.S. 398 (1963). Under that analysis, a court first must determine whether the challenged governmental action creates a burden on the free exercise of religion. If it does not, the matter is at an end. If a burden is found, however, then it must be balanced against the government's interest in pursuing the challenged action. If a

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[4]Petitioners rely (83-589 Pet. 24; 83-669 Pet. 33-36) on one district court case to create a conflict. In *Northwest Indian Cemetery Protective Association* v. *Peterson*, 565 F. Supp. 586 (N.D. Cal. 1983), appeal pending, No. 83-2225 (9th Cir.), the district court, reversing its prior ruling on the denial of a preliminary injunction (552 F. Supp. 951), effectively set aside a 25-square-mile area of the Six Rivers National Forest, which certain Indians regard as sacred, as an Indian religious preserve by permanently enjoining the Forest Service from authorizing or conducting any commercial logging or road building, notwithstanding the Forest Service's plan to establish half-mile protective zones around sacred prayer sites. The government is appealing the district court's decision.

compelling governmental interest outweighs the religious interests, the Free Exercise claim must fall.

This analysis was followed by the court of appeals here (Pet. App. 9). Despite their protestations to the contrary (83-589 Pet. 15-19; 83-669 Pet. 17-26), petitioners' real quarrel is not with the legal test applied by the court of appeals, but rather with its fact-bound conclusion (Pet. App. 17-18) that petitioners failed to carry their burden of proof on the first prong of the analysis. That issue, on which the court of appeals was plainly correct, does not warrant this Court's review.

In contrast to *Badoni* v. *Higginson, supra,*[5] and *Sequoyah*

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[5]In *Badoni,* Navajo Indians asserted that the federal government's management of the Rainbow Bridge National Monument infringed on the Free Exercise Clause for two reasons. First, they claimed that the waters of Lake Powell had completely inundated sacred sites on Monument property, denying the Indians all access to those sacred sites. Second, they claimed that the number of tourists and their disrespectful conduct at the Monument prevented the Indians from conducting religious services. The court of appeals recognized that the Indians' claim did not fall within the generally recognized categories of Free Exercise violations because they alleged neither government compulsion to violate the tenets of their religion nor a benefit conditioned on renunciation of a religious practice. Rather, their claim was grounded on the conduct of tourists at the Monument. The court rejected this claim, concluding that what the Indians sought "in the name of the Free Exercise Clause is affirmative action by the government which implicates the Establishment Clause of the First Amendment" (638 F.2d at 178).

The court went on to explain (638 F.2d at 179, quoting *Otten* v. *Baltimore & O.R.R.*, 205 F.2d 58, 61 (2d Cir. 1953)) that:

> The First Amendment protects one against action by the government, though even then, not in all circumstances; but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities. . . . We must accommodate our idiosyncracies, religious as well as secular, to the compromises necessary in communal life.

Were it otherwise, the court of appeals reasoned, "the Monument would become a government-managed religious shrine" (*Badoni,* 638 F.2d at 179).

v. *TVA, supra,*[6] in which the courts rejected complaints similar to those advanced by petitioners even though in both cases the Indians were completely deprived of access to sacred sites due to flooding by government projects, in this case petitioners have not been deprived of access to the Peaks. The Forest Service allows "free entry onto the Peaks and does not interfere with [petitioners'] ceremonies or the collection of ceremonial objects." Pet. App. 17. Indians have, in fact, used the existing ski lifts to gain access to sacred sites in the Snow Bowl area. *Id.* at 60. The court of appeals stressed that the Indians' religious practices are not confined to the 777-acre permit area, but may occur in many locations on the sacred mountain. *Id.* at 17-18. Further, the court of appeals took note of the fact that the Snow Bowl has been in operation for nearly 50 years and that the Indians' religious practices and beliefs apparently have managed to co-exist with the diverse developments that have occurred there. *Id.* at 18.[7] These factual conclusions supporting the court of appeals' decision that the

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[6]In *Sequoyah,* Cherokee Indians sought to prevent completion of the Tellico Dam on the Little Tennessee River in Tennessee, alleging that the impoundment created by the dam would flood their sacred homeland, destroy sacred sites, medicine-gathering sites, holy places and cemeteries, and disturb the sacred balance of the land (620 F.2d at 1160). The court of appeals affirmed a grant of summary judgment in favor of TVA, ruling that to establish a burden on free exercise the plaintiffs had to prove that the valley to be flooded was "indispensable" or "central" to their ceremonies and practices. The court held that plaintiffs' proof was insufficient, as the evidence indicated that medicines in the valley could be obtained elsewhere and that the flooding would not prevent the plaintiffs from engaging in any particular religious observances.

[7]For example, the court noted that among the structures on the Peaks, in addition to the Snow Bowl, are natural gas, telephone, and electric transmission lines, water tanks for stock, and unimproved roads. Cinder extraction and mining have been conducted on the Peaks for at least the past 30 years. Pet. App. 18 n.6.

Forest Service has not impermissibly burdened petitioners' Free Exercise rights require no further review.

Petitioners' rhetorical question (83-669 Pet. 16-17) whether their claim is governed by "the First Amendment law written by this Court" needs no answer. The result reached by the court of appeals is indeed consistent with established First Amendment principles. The Constitution is designed to accommodate competing religious and secular values in a pluralistic society. The federal government here has made reasonable accommodations to the religious views of traditional Navajos and Hopis. The Constitution does not mandate that the 75,000-acre Peaks, the highest mountain in Arizona, be made into a religious shrine. At the very least, the cases establish that when the government affords Indians access to sacred sites, normal management activity pursuant to congressional authorization cannot amount to an impermissible burden on the Indians' First Amendment right to the free exercise of their religion. Stated otherwise, Indians cannot employ the First Amendment as a means to compel the federal government to set aside large areas of public land as religious preserves.[8]

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[8]We do not quarrel with petitioners' quotation (83-669 Pet. 38) from *Larkin* v. *Grendel's Den, Inc.*, No. 81-878 (Dec. 13, 1982), slip op. 8, that religious interests are "without question . . . entitled to substantial weight." The Court's holding in *Larkin*, however, was that a Massachusetts statute vesting power in governing bodies of churches to veto applications for liquor licenses within a 500-foot radius of a church violated the Establishment Clause of the First Amendment. Petitioners' demand that the federal government manage the Peaks in a manner that comports with their religious views presents an analogous problem. Petitioners' reliance (83-669 Pet. 39) on *Swomley* v. *Watt*, 526 F. Supp. 1271 (D.D.C. 1981), presumably to show how far the federal government may go in devoting public land to a sectarian religious use, is misplaced. The court in *Swomley* never reached the merits of the First Amendment claim; it dismissed the suit because plaintiffs lacked standing. See also *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982).

2. The court of appeals correctly concluded that Congress, in enacting the American Indian Religious Freedom Act, did not intend to set aside areas of public lands as religious sanctuaries.[9] As the court held, AIRFA requires federal agencies to consider, but not necessarily to defer to, Indian religious values. Pet. App. 19-23. The Act was intended only to heighten the federal government's sensitivity to the religious concerns of Native Americans; it was not intended to grant Indians any greater substantive rights than those guaranteed to all citizens by the First Amendment. See S. Rep. 95-709, 95th Cong., 2d Sess. 6 (1978); H.R. Rep. 95-1308, 95th Cong., 2d Sess. 1 (1978).[10] Thus, the court of appeals correctly held (Pet. App. 22) that AIRFA does not prohibit federal agencies from adopting land use policies that conflict with traditional Indian religious beliefs and practices, particularly when, as here, those Indian religious practices and the challenged land use have coexisted for years. An agency undertaking a land use project satisfies its obligations under AIRFA if, in the decisionmaking process, it obtains and considers the views of Indian leaders and if, in project implementation, it avoids

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[9]Petitioners rely (83-669 Pet. 41) on *Peyote Way Church of God, Inc.* v. *Smith*, 556 F.Supp. 632 (N.D. Tex. 1983), to suggest that their views on the management of public lands are buttressed by AIRFA. *Peyote Way* merely protects members of the Native American Church who believe in the use of peyote as a central sacrament; neither that case nor any other suggests that AIRFA enables Native Americans to dictate that public property be managed according to their wishes.

[10]Also instructive is Representative Udall's statement explaining why no hearings were held on the bill (124 Cong. Rec. 21446 (1978)):

> No, there were no hearings held on the resolution. It just seemed so simple and so self-evident that it was merely a statement of policy that we just took it up in full committee and passed it unanimously.

unnecessary interference with Indian religious practices. The court of appeals' conclusion (*id.* at 23) that those requirements were fully met here does not warrant further review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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